

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. **2003B052**

**ORDER RE: RESPONDENT'S MOTION FOR SUMMARY JUDGMENT; INITIAL
DECISION and NOTICE OF APPEAL RIGHTS**

CHERI MIHELICH,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, FREMONT CORRECTIONAL FACILITY,

Respondent.

This matter is before the ALJ on Respondent's Motion for Summary Judgment, Complainant's Response to Respondent's Motion for Summary Judgment with Supporting Authorities and Respondent's Reply Brief Regarding Motion for Summary Judgment with Supporting Authorities. The ALJ, having reviewed the pleadings, file and relevant case law and being sufficiently advised thereof, enters the following order:

STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992). The non-moving party is entitled to all favorable inferences that may be drawn from the evidence, and all doubts must be resolved against the moving party. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992). Once the moving party has met its initial burden of production, the burden shifts to the non-moving party to establish that a triable issue of fact exists. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732 (Colo. 1991).

A genuine issue of fact cannot be raised simply by means of argument. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970). When opposing a summary judgment motion, a party must counter the moving party's statements of fact by affidavit or other evidence that sets forth specific facts demonstrating the existence of a triable issue of fact. *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993). An affirmative showing of specific facts, uncontradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. *Terrell v. Walter E. Heller & Co.*, 165 Colo. 463, 467, 439 P.2d 989, 991 (1968).

At the commencement of the hearing on this matter the undersigned administrative law judge outlined the issues to be considered by her at the conclusion of the hearing on this matter. Those issues are as follows:

- a) Whether Complainant committed the acts for which discipline was imposed;
- b) Whether the actions of the appointing authority arbitrary, capricious, or contrary to rule or law;
- c) Whether the discipline imposed was within the range of reasonable alternatives;
- d) Whether an award of attorney fees is warranted in this matter.

Respondent indicated that it would be filing a motion for summary judgment and a briefing scheduled was established. Respondent's motion and reply were timely filed. Complainant's response was filed one day late.

Complainant's response to Respondent's Motion for Summary Judgment either admits, denies or states that she is "without any information or knowledge as to the facts set forth." She repeatedly makes allegations that she does not support with any evidence. Rather, she states she will provide the evidence to support these statements at the hearing.

Finally she states that any notes exchanged between her and Inmate Thompson occurred from approximately June of 2001 to August 2001 and that in August 2001 she reported and presented the notes to her supervisor who told her that he reported the incident and that it was remedied. These statements in Complainant's response are prefaced with "[t]he following are facts that will be supported by introduction of evidence at the Hearing." Complainant's response concludes with the statement "[I]n summary Complainant possesses and will offer as evidence, documents supporting the elements essential to her Appeal of Disciplinary Termination."

In order to prevail against Respondent's motion for summary judgment, Complainant "may not rest upon the mere allegations or denials" of Respondent's motion but must "set forth such facts as would be admissible in evidence." C.R.C.P. 56(e). The findings of fact are made with this standard in mind.

FINDINGS OF FACT

1. Robert B. Allen has been employed as the Associate Warden at the Department of Corrections, Fremont Correctional Facility since 2001. Allen was delegated the authority to issue the disciplinary action against Mihelich.
2. Mihelich was hired by the Department of Corrections ("DOC") as a Correctional Officer I in March 2000. Mihelich worked at the Fremont Correctional Facility. Mihelich's DOC Training Record reflects that she has taken numerous classes

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pertaining to dealing with inmates, including Games Criminals Play, Sexual Misconduct, and Professionalism.

3. In September 2002, it was brought to DOC's attention that Mihelich had allegedly had an inappropriate romantic relationship with an inmate.
4. Danny Lake, an investigator with Criminal Investigation Division of DOC's Office of the Inspector General, conducted an investigation into the allegation that Mihelich had an inappropriate romantic relationship with an inmate, Ronald Thompson.
5. Lake found that on September 26, 2002, notes and letters written by Mihelich were found in inmate Ronald Thompson's possession at Arrowhead Correctional Facility.
6. Lake found that Inmate Thompson was housed in living Unit 4 at Fremont Correctional Facility from April 10, 2000 to August 14, 2002; and Mihelich worked in living Unit 4 at Fremont Correctional Facility from March or April 2001 through her termination in November 2002.
7. Robert A. Thiede, Jr., a forensic document examiner employed by DOC's Office of the Inspector General, conducted a forensic document examination on the letters and notes recovered from Inmate Thompson's property and of the known handwriting of Mihelich given to him by Lake. Thiede was able to conclude six of the documents contained Mihelich's handwriting. Portions of those six letters contained the following statements:
 - a. One letter states "You're my heart you're my soul. I will never let go. I love you, miss you. Forever yours. Believe in us."
 - b. A second letter states "I may not be out at yard tonight. . .PS Sorry I can't talk to you. & Please don't flick your light when I leave at night. . . .PSS I LOVE YOU!!!"
 - c. A third letter states "I'm sorry about last week. Hope it fits. Hope you still want it. Miss you. Love you."
 - d. A fourth letter states, in part, "I want to tell everyone that all my wishes have come true, but I can't (not yet anyway). Don't give up. You & I will be more than we could ever expect to be, that is if you always trust & believe in us. Don't ever listen to anyone no matter what you hear!!! I will be waiting for you. I love you!"
 - e. A fifth letter states, in part, "Don't give up! Do your time and I will do mine. When were both together it will be worth the wait . . . I am going to try to get into law school and change my career so its easier for us to be together. . . . I love you. You are all I think about and dream about. Don't give up . . . we will be together when you get out."

- f. A sixth letter states, in part, "I guess certain things will never change in our situation, and I don't think freedom would make a difference. I miss you when I am not near you, and I can only hope that when I do see you a smile will be on your face. Why are you so worried about what I have to lose since you took everything that I had to lose away from me last night."
8. On October 2, 2002, Mihelich admitted during Lake's interview of her that she wrote notes or letters to Inmate Thompson. This interview was documented by Lake.
 9. During another meeting on October 2, 2002 between Mihelich, Warden Gary Neet and Lake, Mihelich again admitted she had been involved in an inappropriate romantic relationship with an incarcerated offender.
 10. During an interview of Inmate Thompson on November 7, 2002, Thompson admitted to Lake that he and Mihelich had corresponded back and forth. This interview was documented by Lake.
 11. By letter dated October 3, 2002, Warden Gary Neet placed Mihelich on paid administrative suspension effective October 2, 2002.
 12. Allen, the delegated appointing authority, considered the seriousness of the allegations against Mihelich and determined that disciplinary action against Mihelich might be warranted. Allen decided to hold a meeting with Mihelich in accordance with Personnel Board Rule R-6-10. By letter of October 15, 2002, Allen notified Mihelich of the R-6-10 meeting.
 13. Prior to the R-6-10 meeting Allen spoke with Investigator Lake, reviewed the notes and letters allegedly written by Mihelich to Inmate Thompson, reviewed two memorandums prepared by Investigator Lake dated October 2 and 9, 2002, reviewed a memorandum from Robert Thiede regarding his forensic document examination, and reviewed Mihelich's personnel file.
 14. On October 24, 2002, Allen met with Mihelich in accordance with State Personnel Board Rule R-6-10. Attorney Ian Kalmanowitz attended the meeting as Mihelich's representative.
 15. At the R-6-10 meeting, Mihelich acknowledged that she passed at least one note to Inmate Thompson.
 16. At the R-6-10 meeting, Mihelich offered as mitigation the fact that she was having marital problems and was taking antidepressants. She also stated that she had had a romantic relationship with another correctional officer who was married.

17. Allen considered all written and verbal information collected before making his decision. In particular, after the R-6-10 meeting, Allen:

- a. reviewed the audiotape of the R-6-10 meeting;
- b. again reviewed the notes and letters allegedly written by Mihelich to Inmate Thompson;
- c. spoke to Paul Audet (because Mihelich mentioned during the R-6-10 meeting that she wrote romantic notes to Audet at work during the same time period), who stated that he and Mihelich had never corresponded;
- d. again reviewed the October 2 and 9, 2002 memorandums prepared by Lake;
- e. reviewed the applicable DOC Administrative Regulation 1450-01, the Staff Code of Conduct; and
- f. again reviewed Mihelich's personnel file.

18. Allen concluded that Mihelich was involved in an inappropriate romantic relationship with Inmate Thompson.

19. Allen determined that Mihelich had engaged in willful misconduct in violation of Department of Corrections' Administrative Regulation 1450-01, Staff Code of Conduct.

20. In particular, AR 1450-01 (effective October 15, 2001) at Section IV, states:

D. Staff may not knowingly maintain social, emotional, sexual, business or financial associations with current offenders, former offenders, or the family and/or friends of offenders. This also includes, but is not limited to, telephone calls, letters, notes, or other communications outside the normal scope of employment.

. . .

F. Staff shall not discuss with offenders their personal life or another staff's personal life.

. . .

N. Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion.

The same portions of Administrative Regulation 1450-01 in effect beginning January

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31, 2002 are essentially identical.

21. Allen also reviewed and considered:

- a. the nature, extent, seriousness, and effect of Mihelich's acts, errors and omissions;
- b. Mihelich's personnel history, including performance appraisals, prior disciplinary and corrective actions, and other documentation concerning performance and conduct;
- c. the type and frequency of prior unsatisfactory behavior or acts
- d. the period of time since any prior offenses;
- e. mitigating information provided during the R-6-10 meeting or elsewhere;
- f. the credibility of Mihelich and other witnesses; and
- g. the need for impartiality in dealing with employees.

22. Allen found Mihelich's misconduct to be serious and flagrant because Mihelich's misconduct could have jeopardized the security of the facility and endangered staff, other offenders, and the public. Mihelich's behavior violates the most basic and primary responsibilities of correctional staff to uphold the laws of the State of Colorado, the rules and regulations of the Department of Corrections and Fremont Correctional Facility, and lastly, to protect the staff, offenders, and citizens of Colorado. Mihelich's actions opened the door for illegal and dangerous activities for the offender population. This behavior endangers anyone working, living or providing services within the facility.

23. Allen also found that Mihelich's credibility and effectiveness as a correctional officer had been irreparably compromised. By her actions, Mihelich lost the ability to function properly and effectively in a correctional setting. After compromising her integrity, Mihelich became a target for all offenders, thus losing her ability to objectively and properly supervise offenders from her position of trust. In addition, Mihelich failed to take any responsibility for her actions.

24. Allen decided to issue disciplinary action to Mihelich.

25. Allen considered other lesser forms of discipline but determined that termination of employment was the appropriate action.

26. On November 1, 2002, Allen notified Mihelich in writing that her employment was being terminated. In this letter, Allen set forth in detail the basis for his decision to issue the disciplinary action.

27. The termination was effective November 7, 2002.

28. On November 14, 2002, Mihelich filed a Notice of Appeal with the State Personnel Board.

DISCUSSION

A. General

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

B. Complainant committed the acts for which she was disciplined

Complainant was disciplined for maintaining a social, emotional, sexual, business or financial association with a current offender, discussing her personal life with an offender, jeopardizing the security of the facility and calling into question her ability to perform her job. Such behaviors are violations of DOC's Staff Code of Conduct, AR1450-01.

Respondent established by affidavit that its investigation of Complainant disclosed that handwritten notes indicative of a personal relationship were found in an inmate's possession, the notes were in Complainant's handwriting and that Complainant, in at least

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one meeting, admitted to having a relationship with the inmate who possessed the notes. The content of the notes was uncontested by Complainant. In her response, Complainant states that any exchange of notes between her and the inmate was reported to her supervisor, and he was given those notes. However, this does not address the existence of the six notes in the inmate's possession, the tone of those six notes nor that the notes were determined by a handwriting expert to be in Complainant's handwriting.

Complainant committed the acts for which she was disciplined.

C. Allen did not act arbitrarily, capriciously, or contrary to rule or law in disciplining Complainant

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

Prior to imposing discipline against Complainant, Allen reviewed the handwritten notes written by Mihelich to the inmate, the investigative memos prepared by Lake, the audiotape of the R-6-10 meeting, Mihelich's personnel file, the analysis of the handwriting expert and the applicable DOC administrative regulations. He also spoke with Paul Audet, because, during the R-6-10 meeting, Complainant had stated that she had written romantic notes to Audet. Respondent conducted a thorough investigation.

Respondent held an R-6-10 meeting with Complainant at which Complainant had an attorney representing her. There was no evidence presented that Allen ignored any evidence or refused to consider anything with which Complainant presented him, either prior to or during the R-6-1 meeting. Rather, the evidence demonstrates that he followed up on evidence presented by Complainant, by interviewing Audet. Allen considered all of the evidence presented to him.

When a correctional officer has an inappropriate relationship with an inmate, it is reasonable to conclude that the relationship will have a detrimental effect on her fulfillment of her job responsibilities and her workplace environment. In this case a staff member has engaged in an ongoing relationship with a current offender and, given the gist and tone of her notes to the inmate, plans on having a relationship with the offender for the foreseeable future. Given the credible evidence demonstrating Complainant's relationship with the inmate and the potentially detrimental effect of that relationship on the workplace environment, Allen reasonably exercised his discretion in disciplining Complainant.

The Respondent did not act arbitrarily, capriciously or contrary to rule or law in

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disciplining Complainant.

D. The discipline imposed was within the range of reasonable alternatives

In determining the level of discipline to impose, an appointing authority must take into consideration the aggravating and mitigating factors of an individual case. Board Rule R-6-6, 4 CCR 801.

Complainant wrote six notes to the inmate, all of which were very personal and indicated an ongoing relationship. These notes indicate an intention or understanding of an ongoing relationship, both during and after the time of the inmate's incarceration. They are an indication of a clear cut and continuing violation of the DOC administrative regulation against relationships with current or former inmates.

Given the serious nature of the violation, its impact on the workplace environment and the willfulness of Complainant's actions, termination was within the range of reasonable alternatives for discipline.

E. Attorney fees

In its Prehearing Statement, Respondent requested attorney fees. The Motion for Summary Judgment did not address the attorney fees issue. Therefore, the issue is not addressed in this order.

CONCLUSIONS OF LAW

1. Complainant committed the act for which she was disciplined.
2. Respondent's disciplinary action against Complainant was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.

ORDER

Respondent's Motion for Summary Judgment is **granted**. Respondent's disciplinary action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 27th day
of May, 2003, at
Denver, Colorado

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln, Suite 1420
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of May, 2003, I placed true copies of the foregoing **ORDER RE: RESPONDENT'S MOTION FOR SUMMARY JUDGMENT; INITIAL DECISION and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Cheri Mihelich
2634 Acero Ave.
Pueblo, Colorado 81004

and by courier to:

Melissa Mequi
Assistant Attorney General
Department of Law
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Denver, CO 80203

Andrea C. Woods